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Bueno, Nicolas

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## **Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations**

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### **Abstract**

When 250 workers die in a fire at a Pakistani factory producing jeans for a German discount chain, when the work day lasts twelve hours in Cambodia's garment industry or when workers commit suicide in Chinese factories producing electronics for international brands, should only the corporations in Pakistan, Cambodia, and China be held liable? What about the liability of their parent and subcontracting companies abroad? The United Nations increasingly recommends that states ensure that enterprises domiciled in their territory respect human rights throughout their extraterritorial operations. Furthermore, the United Nations and the OECD recommend that parent and subcontracting companies conduct human rights due diligence. Both developments are reflected in General Comment 23, which was recently adopted by the Committee on Economic, Social and Cultural Rights and relates to the right to just conditions of work. To date, however, there is no domestic law that specifically addresses the liability of parent or subcontracting companies for violations of the right to just working conditions of employees of foreign subsidiaries or suppliers. Although case law is emerging, much uncertainty remains about criteria establishing such liability. France and Switzerland are discussing legislative steps for clarifying corporate liability beyond disclosure requirements to ensure compliance with international recommendations.

### **Keywords**

Multinational Corporations, Right to Just Conditions of Work, Working Conditions, Supply Chains, Due Diligence, United Nations Guiding Principles on Business and Human Rights

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## Introduction

One reason why multinational corporations transfer parts of their production to foreign countries is to save on production costs. When 250 workers die in a fire at a Pakistani factory producing jeans for a German discount chain,<sup>1</sup> when the work day lasts 12 hours in Cambodia's garment industry to meet the production targets of international brands,<sup>2</sup> or when workers commit suicide in Chinese factories that produce electronics for international brands,<sup>3</sup> should only the corporations domiciled in Pakistan, Cambodia or China be held liable? What about the liability of their parent or subcontracting companies abroad?

This article builds on the increasing academic literature in business and human rights since the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGP) in 2011.<sup>4</sup> Following the three pillars of the UNGP, this literature discusses the existence of and defines the scope of the state's duty to protect human rights by regulating the extraterritorial activities of businesses domiciled in their territory or jurisdiction.<sup>5</sup> It also defines the notion of corporate responsibility to respect human rights, which falls under the second pillar of the UNGP, by

clarifying the concept of corporate human rights due diligence.<sup>6</sup> International human rights scholars have paid less systematic attention to corporate liability as a way to implement the third pillar on access to remedy. To date, the question of parent and subcontracting companies' liability for human rights abuses committed abroad mostly remains in the field of tort law.<sup>7</sup> Although NGOs and some human rights scholars are more closely linking the issue of corporate liability and corporate human rights abuses,<sup>8</sup> it is recognized that meaningful progress has not been made with regard to the third pillar of the UNGP.<sup>9</sup>

For the sake of definitional clarification, this article applies the UNGP terminology and refers to states' human rights *obligations*, which include the state's *duty* to protect human rights, and to the corporate *responsibility* to respect human rights. This article does not discuss the binding or non-binding character of these obligations, duties, and responsibilities<sup>10</sup> but rather intends to note the increasing number of references to them in international human rights law. By focusing on the specific human right to just conditions of work, this article aims to contribute to the debate in business and human rights by illustrating that domestic laws that establish the liability of parent and subcontracting companies that fail to respect that right extraterritorially are necessary in order to realize the state's duty to protect the right to just conditions of work and to ensure access to remedies for affected workers abroad.

First, this article presents the material scope of the human right to just conditions of work. Defining the content of that human right is necessary in order to determine the corresponding corporate responsibility to respect it and how parent and subcontracting companies should carry out due diligence in that regard. The second part focuses on the domestic implementation of the state's duty to protect the right to just conditions of work by regulating the conduct of extraterritorial activities of corporations. It shows that domestic laws establishing corporate liability for parent and subcontracting companies for human rights abuses abroad are necessary beyond disclosure requirements to ensure access to remedies. Although there is an emergent case law in the United Kingdom, France, and the United States that addresses the liability of parent or subcontracting companies for violations of the right to just conditions of work of employees in foreign subsidiaries or suppliers, much uncertainty remains about the outcome of such proceedings. To fill the gap, France and Switzerland are discussing legislative steps to clarify corporate liability for human rights abuses committed abroad.

## **1. The right to just conditions of work in a global economy**

The right to just and favourable conditions of work is a well-established human right. Its content has recently been presented in General Comment 23, adopted by the international Committee on Economic, Social and Cultural Rights (CESCR) (1.1). Beyond a state's duty to protect this right, international documents such as the UNGP and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises<sup>11</sup> recommend that corporations respect it throughout their operations extraterritorially and carry out due diligence in that regard (1.2). Finally, UN treaty bodies increasingly recommend that states ensure that corporations

domiciled in their territory respect human rights, including the right to just conditions of work, and are held accountable for violations committed extraterritorially (1.3).

## ***1.1 The right to just conditions of work***

### ***1.1.1. Legal basis***

The right to just and favourable conditions of work, along with the right to work and the right to join trade unions, is an economic human right. The very first draft of the Universal Declaration of Human Rights (UNDH) states the following: ‘[e]veryone has the right to good working conditions’.<sup>12</sup> After amendment proposals from France,<sup>13</sup> the USSR,<sup>14</sup> and the Byelorussian Soviet Socialist Republic,<sup>15</sup> among others, this human right was spread across two articles. Article 23 of the UNDH now guarantees that everyone has the right to just and favourable conditions of work; to equal pay for equal work without any discrimination; and to just and favourable remuneration, ensuring for himself and his family an existence worthy of human dignity. On the other hand, Article 24 states that ‘everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’

The right to just conditions of work has been further clarified in Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is reproduced here:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his [sic] employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Furthermore, at the regional level, Article 15 of the African Charter on Human and Peoples’ Rights states that ‘every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.’ The right to just working conditions is further protected by Article 34(2) and (4) of the Arab Charter on Human Rights<sup>16</sup> and Article 27(1) of the non-binding Association of Southeast Asian Nations Human Rights Declaration.<sup>17</sup> In the European context, the right to just conditions of work is not included in the European Convention on Human Rights. Rather, it is protected by Articles 2, 3, and 4 of the Revised European Social Charter<sup>18</sup> and

Article 31 of the Charter of Fundamental Rights of the European Union.<sup>19</sup> Finally, the right to just working conditions is included in Article 7 of the Additional Protocol of San Salvador to the American Convention on Human Rights.<sup>20</sup>

The right to just conditions of work, as established in universal and regional human rights treaties, is not reflected in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>21</sup> The ILO Declaration is broader in scope and encompasses freedom of association, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in employment.<sup>22</sup> Only the elimination of discrimination in employment reflects a part of the human right to just and favourable conditions of work.<sup>23</sup> Although the lack of correspondence has been criticized,<sup>24</sup> while also justified on practical and strategic grounds,<sup>25</sup> Alston notes that ‘the list should include the right to a safe and healthy workplace, the right to some limits on working hours, the right to reasonable rest periods, and protection against abusive treatment in the workplace.’<sup>26</sup> Despite doctrinal critics, the right to just conditions of work remains sustained, in practice, by several ILO conventions that provide practical guidance for its material scope.

#### *1.1.2. The material scope of the right to just conditions of work*

With regard to the material scope of the right to work, the Committee on Economic, Social, and Cultural Rights has just released General Comment 23 on Article 7 of the ICESCR.<sup>27</sup> Following the structure of Article 7 of the ICESCR, General Comment 23 identifies four core elements of the right to just conditions of work: fair, equal, and sufficient remuneration; healthy and safe working conditions; equal opportunity for promotion; and rest, leisure, reasonable limitation of working hours and holidays with pay. These four core elements are addressed one at a time.

##### *i. The right to fair, equal, and sufficient remuneration*

In General Comment 23, the CESCR identifies three criteria that must be considered when assessing remuneration. First, wages must be fair. Second, remuneration must be equal for work of equal value. Finally, it must provide all workers with a decent living for themselves and their families.

With regard to the first criterion, a wage is fair when it reflects the responsibilities of the worker, the level of skill and education required to perform the work, the impact of the work on the health and safety of the worker, and specific hardships related to the work as well as the impact on the worker’s personal and family life.<sup>28</sup> Turning to the equality criterion, remuneration shall not only be equal among similar jobs to avoid direct discrimination based on gender, race, ethnicity, nationality, migrant or health status, disability, age, sexual orientation, gender identity, or any other grounds but also be equal when the work is completely different but nonetheless of equal value.<sup>29</sup> To avoid indirect discrimination, states are required to compare rates of remuneration across organizations, enterprises, and professions based on objective factors such as skills, responsibilities, and the required effort of the worker, as well as working conditions.<sup>30</sup>

Finally, remuneration must be sufficient to provide workers with a decent living for themselves and their families. In this regard, the CESCR has criticized wages that are too low to enable people to ‘live above the poverty line’,<sup>31</sup> ‘cover the subsistence costs of a household’,<sup>32</sup> ‘enable workers to meet their family’s essential needs’,<sup>33</sup> ‘allow a modest standard of living’<sup>34</sup> or ‘secure a standard of living with dignity’.<sup>35</sup> General Comment 23 specifies further that ‘remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing, and additional expenses such as commuting costs’.<sup>36</sup> In that respect, ILO Minimum Wage Fixing Convention 1970 (No. 131) provides further guidance. According to that convention, in addition to the needs of workers, their families, and the cost of living, a minimum wage should also consider the general level of wages in the country and the relative living standards of other social groups.<sup>37</sup> That criterion thus combines considerations of basic needs with the relational aspect of fairness in wage distribution.<sup>38</sup>

*ii. The right to safe and healthy working conditions*

The second core element of the right to just conditions of work is the right to safe and healthy working conditions as described in Article 7(b) of the ICESCR. The CESCR interprets this provision as obliging states to prevent occupational accidents and disease as a fundamental aspect of the right to just and favourable conditions of work.<sup>39</sup>

Referring to ILO Occupational Safety and Health Convention 1981 (No. 155) in its General Comment, the CESCR focuses on the adoption of national policies that address the design, testing, choice, substitution, installation, arrangement, use and maintenance of workplaces, as well as the working environment including tools, machinery and equipment, and chemical, physical and biological substances, and work processes.<sup>40</sup> Moreover, national policies should incorporate appropriate monitoring and enforcement provisions and provide adequate penalties in cases of violations, including the right of authorities to suspend the operation of unsafe enterprises.<sup>41</sup> Finally, within the right to safe and healthy working conditions, workers affected by a preventable occupational accident or disease should have a right to a remedy, including access to appropriate grievance mechanisms, such as courts, to resolve disputes.<sup>42</sup>

*iii. The right to equal opportunity for promotion*

The third core element of the right to just conditions of work is the right to equal opportunity for promotion through fair, merit-based, and transparent processes. The CESCR interprets the notion of promotion in Article 7(c) of the ICESCR as also encompassing hiring and termination processes of employment.<sup>43</sup> In those processes, there should be no place for irrelevant criteria such as personal preference or family, political and social links. This is highly relevant for women and other workers, such as workers with disabilities, workers from certain ethnic, national and other minorities, lesbian, gay, bisexual, transgender and intersex workers, older workers and indigenous workers.<sup>44</sup>

The right to equal opportunity for promotion is also closely related to the right to work in Article 6 of the ICESR<sup>45</sup> as well as to ILO Discrimination in Respect of Employment and Occupation Convention 1958 (No. 111). That convention specifies under which conditions ‘inherent requirements’ to perform a specific job such as age, health or ‘security considerations’ may be lawfully invoked to deny an individual access to work. Finally, as far as termination of employment is concerned, ILO Termination of Employment Convention 1982 (No. 158), which also provides guidance, requires states to provide valid reasons for dismissal and guarantees the right to legal redress in the case of unjustified dismissal.<sup>46</sup>

*iv. The right to rest, leisure, reasonable limitation of working hours and holidays with pay*

The fourth and last core element of the right to just conditions of work is the right to rest, leisure, reasonable limitation of working hours and holidays with pay. In that regard, the CESCR also refers to ILO conventions to establish quantitative limits on work.<sup>47</sup> The general daily limit should be eight hours.<sup>48</sup> In cases in which legislation permits longer work days, employers should compensate longer days with shorter work days so that the average number of work hours over a period of weeks does not exceed the general principle of eight hours per day.<sup>49</sup> Moreover, the CESCR notes that many state parties have opted for a forty-hour week and recommends that state parties that have not yet done so take steps progressively to achieve this target.<sup>50</sup> Finally, all workers must enjoy weekly rest periods amounting to at least 24 consecutive hours for every seven-day period.<sup>51</sup> Legislation should also identify the entitlement of at least three work weeks of paid leave for one year of full-time service.<sup>52</sup>

This section attempts to provide an overview of the universal scope of the right to just conditions of work as interpreted by the CESCR. However, regional differences may exist. In the context of holidays with pay, for instance, Article 2(3) of the European Social Charter guarantees four weeks of holiday with pay. The table below provides an overview of the main legal provisions in international treaties as well as in the Universal Declaration of Human Rights that relate to at least one core element of the human right to just conditions of work. The table is not exhaustive and does not provide a qualitative account of the provisions.

	<b>Fair, Equal, Sufficient Remuneration</b>	<b>Safe, Healthy Working Conditions</b>	<b>Equal Opportunity for Promotion</b>	<b>Rest, Leisure, Work Hours, Holiday</b>
Hours of Work (Industry) Convention 1919 (No. 1)				Art. 2
Weekly Rest (Industry) Convention 1921 (No. 14)				Art. 2
Hours of Work (Commerce and Offices) Convention 1930 (No. 30)				Art. 3, Art. 4
Forty-Hour Week Convention 1935 (No. 47)				Art. 1
Universal Declaration of Human Rights 1948	Art. 23(2), (3)	Art. 23(1)	Art. 23(1)	Art. 24



Equal Remuneration Convention 1951 (No. 100)	Art. 2			
Weekly Rest (Commerce and Offices) Convention 1957 (No. 106)				Art. 6
Discrimination (Employment and Occupation) Convention 1958 (No.111)			Art. 2	
International Covenant on Economic, Social, and Cultural Rights 1966	Art. 7(a)	Art. 7(b)	Art. 6(1), Art. 7(c)	Art. 7(d)
Minimum Wage Fixing Convention 1970 (No.131)	Art. 3			
Holidays with Pay Convention (Revised) 1970 (No. 132)				Art. 3
Convention on the Elimination of All Forms of Discrimination against Women 1979	Art. 11(1)(d)	Art. 11(1)(f)	Art. 11(1)(b), Art. 11(2)	Art. 11(1)(e)
African Charter on Human and Peoples' Rights 1981	Art. 15	Art. 15	Art. 15 (?)	Art. 15 (?)
Occupational Safety and Health Convention 1981 (No. 155)		Art. 4, Art. 5		
Termination of Employment Convention 1982 (No. 158)			Art. 5	
Additional Protocol to the American Convention on Human Rights 1988	Art. 7(a)	Art. 7(e)	Art. 7(c)	Art. 7 (g), (h)
European Social Charter (Revised) 1996	Art. 4(1), (2), (3), (4), (5)	Art. 2(4), Art. 3(1), (2), (3), (4)	Art. 1(2), Art. 20, Art. 27	Art.2(1), (2), (3), (5), (7)
Charter of Fundamental Rights of the European Union 2000	Art. 23(1), Art. 31(1)	Art. 31(1)	Art. 30	Art. 31(2)
Arab Charter on Human Rights 2004	Art. 34(2), (4)	Art. 34(2)	Art. 34(1), (4)	Art. 34(2)
Promotional Framework for Occupational Safety and Health Convention 2009 (No. 187)		Art. 2, Art. 3		

### ***1.2 The corporate responsibility to respect the right to just conditions of work extraterritorially***

The right to just conditions of work entails four core rights: to fair, equal, and sufficient remuneration; to safe and healthy working conditions; to equal opportunity for promotion; and to rest, leisure, reasonable limitation of working hours and holidays with pay. While Article 7 of the ICESCR was meant to oblige states, in practice, corporations can greatly impact each of these core elements throughout their day-to-day activities. They may undermine these rights by providing insufficient wages, failing to prevent occupational accidents, hiring or firing in a discriminatory manner or imposing forced overtime. It is thus not a coincidence that international documents are increasingly defining the due diligence that corporations should apply with regard to the human right to just conditions of work as part of their responsibility to respect it.

Although the concepts of responsibility to respect human rights and of human rights due diligence come from the second pillar of the UNGP, the OECD Guidelines for Multinational Enterprises entail similar recommendations for corporations operating abroad. Furthermore, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>53</sup> and General

Comment 23 delineate specific corporate responsibilities towards the right to just working conditions. Prior to presenting these specific corporate responsibilities, it is necessary to understand the due diligence that corporations should apply to human rights in general.

### *1.2.1 General corporate human rights due diligence*

In the UNGP, due diligence is the central element of corporate responsibility to respect human rights.<sup>54</sup> The same concept of due diligence is included in the OECD Guidelines, which specifically address the conduct of multinational enterprises in their global operations.<sup>55</sup> Both documents entail practical recommendations on how corporations can contribute positively to human rights and avoid adverse consequences.<sup>56</sup> Corporations are required to act in five steps.<sup>57</sup> First, they should identify and assess actual and potential adverse human rights impacts;<sup>58</sup> potentially affected groups, such as workers, should be meaningfully consulted.<sup>59</sup> Second, the findings from the impact assessments should be effectively integrated across relevant internal functions within the corporation. Responsibilities for addressing such impacts should be assigned.<sup>60</sup> Third, corporations should take the necessary steps to cease or prevent adverse human rights impacts.<sup>61</sup> Fourth, they should account for how they address their actual and potential adverse impacts.<sup>62</sup> Fifth, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for their remediation.<sup>63</sup>

Regarding the necessary steps to cease or prevent such adverse impacts, both the UNGP and the OECD Guidelines recommend that corporations use their leverage to mitigate any impact to the greatest extent possible. ‘Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that causes adverse human rights impacts.’<sup>64</sup> This applies to parent-subsidiary relationships and means that a parent company should take the necessary steps to prevent the impact caused by a subsidiary by using its leverage when it is able to effect change in the practices of that subsidiary.

Moreover, the corporation should also exercise its leverage towards ‘business relationships’,<sup>65</sup> which include entities in the supply chain. The OECD Guidelines are particularly precise on the matter.<sup>66</sup> Whether such leverage exists depends on the practical circumstances of the relationship, such as the structure and complexity of the supply chain or the market position of the enterprise vis-à-vis its suppliers.<sup>67</sup> The extent of the specific steps to be taken depends then on factors such as the size of the enterprise, the context of its operations, and the severity of the adverse impacts.<sup>68</sup> For example, enterprises can influence suppliers through ‘contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements.’<sup>69</sup> When suppliers potentially impact human rights, the enterprise may continue the relationship throughout the course of risk mitigation efforts; temporarily suspend the relationship while pursuing ongoing risk mitigation; or as a last resort, disengage with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.<sup>70</sup>

### *1.2.2 Specific corporate responsibilities*

In addition to the due diligence that corporations should apply to human rights in general, the ILO Tripartite Declaration, Chapter V of the OECD Guidelines relating to employment and industrial relations, and General Comment 23 entail specific recommendations for multinational enterprises with regard to the right to just conditions of work. These corporate responsibilities are addressed in turn following the order of the core elements of the right to just working conditions presented above.<sup>71</sup>

Regarding remuneration, both the ILO Tripartite Declaration and the OECD Guidelines recommend that wages offered by multinational enterprises not be less favourable to the workers than those offered by comparable employers in the country concerned.<sup>72</sup> Where comparable employers may not exist, they should provide the best possible wages and conditions of work within the framework of government policies. They should at least be adequate to satisfy the basic needs of the workers and their families.<sup>73</sup>

As far as health and working conditions are concerned, the ILO Tripartite Declaration recommends that multinational enterprises maintain the highest standards of safety and health within the enterprise.<sup>74</sup> According to the OECD Guidelines, enterprises should ‘take adequate steps to ensure occupational health and safety in their operations.’<sup>75</sup> Aware that multinational enterprises may have relevant experience, including knowledge of special hazards, they should make available ‘information on the safety and health standards relevant to their local operations.’<sup>76</sup> Furthermore, Article 16 of ILO Occupational Safety and Health Convention 1981 (No. 155) also requires ratifying states to impose direct obligations on employers to ensure safe and healthy working conditions.<sup>77</sup> Employers are required to ensure that the workplaces, machinery, equipment and processes under their control are safe and without risk to health. Moreover, they are required to ensure that the chemical, physical and biological substances and agents under their control are without risk to health and to provide adequate protective clothing and protective equipment to prevent risk of accidents or of adverse effects on health.<sup>78</sup>

Turning to the corporate responsibility to respect the third core element of the right to just working conditions, both the ILO Tripartite Declaration and the OECD Guidelines state that enterprises should be guided throughout their operations by the principle of equality of opportunity and treatment in employment and should not discriminate against their workers.<sup>79</sup> Finally, there is no detailed reference to the corporate responsibility to respect the right to rest, leisure, reasonable limitation of work hours and holidays with pay. Corporations should nevertheless provide the best possible ‘conditions of work’, within the framework of government policies.<sup>80</sup>

These corporate responsibilities to respect the right to just conditions of work are also included in the recent General Comment 23. The CESCR has made clear that corporate responsibility applies to all four core elements, although it emphasizes the responsibility to respect the safety and health of workers. Referring to the UNGP, General Comment 23 also specifies that ‘in situations where a

business enterprise has caused or contributed to adverse impacts, the enterprise should remedy the damage.’<sup>81</sup> The relevant paragraph addressing the corporate responsibility to respect the right to just conditions of work is reproduced here:

While only States are parties to the Covenant, business enterprises ... have responsibilities to realize the right to just and favourable conditions of work. This is particularly important in the case of occupational safety and health given that the employer’s responsibility for the safety and health of workers is a basic principle of labour law, intrinsically related to the employment contract, but it also applies to other elements of the right.<sup>82</sup>

### ***1.3 The State’s duty to ensure that corporations respect the right to just conditions of work extraterritorially***

The corporate responsibility to respect the right to just conditions of work extraterritorially would remain weak or even meaningless without states enforcing it. Regarding the question of enforcement of the right to just working conditions, the CESCR recommends that states ‘impose sanctions and appropriate penalties on third parties, including adequate reparation, criminal penalties, pecuniary measures such as damages, and administrative measures, in case of violation of any of the elements of the right.’<sup>83</sup> Does this apply to corporations domiciled in the territory that violate the right to just conditions of work of employees in foreign subsidiaries or suppliers?

According to the UNGP, states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory or jurisdiction nor are they generally prohibited from doing so.<sup>84</sup> In that regard, the UNGP distinguish, although without much clarity,<sup>85</sup> between ‘domestic measures with extraterritorial implications’ and ‘direct extraterritorial’ measures.<sup>86</sup> While this distinction may be useful in explaining which measures are permissible in international law,<sup>87</sup> it does not answer whether states have a duty to ensure that corporations respect the right to just working conditions extraterritorially. According to Augenstein, what should be decisive to trigger states’ extraterritorial human rights obligations is that the *de jure* relationship between the state and the corporation constitutes a *de facto* relationship of power of the state over an individual, within or outside of territorial boundaries, that brings the individual within the state’s human rights jurisdiction.<sup>88</sup>

Beyond this doctrinal debate, prior to the UNGP, UN treaty bodies already interpreted human rights treaties’ obligations as including a state’s duty to regulate the extraterritorial activities of corporations domiciled in their territory or jurisdiction.<sup>89</sup> Such references have continued to increase since.<sup>90</sup> The CESCR in particular has adopted the practice of adding a specific paragraph to its concluding observations addressing the domestic regulatory framework that states have implemented or should implement to ensure that companies operating abroad fully respect economic, social and cultural human rights.<sup>91</sup> The same duty is also laid down in Principle 25(c) of the non-binding Maastricht Principles on Extraterritorial Obligations.<sup>92</sup> Within their duty to

protect economic, social and cultural rights extraterritorially, states must accordingly adopt and enforce measures as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled in the state concerned. This reflects the active personality principle as a basis for extraterritorial jurisdiction and, accordingly, a state may regulate the conduct of its nationals abroad.<sup>93</sup>

In Europe, the Committee of Ministers of the Council of Europe has recently adopted a recommendation on human rights and business clarifying that question.<sup>94</sup> The duty to protect human rights abroad has two dimensions. First, states should apply measures to require ‘business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad’.<sup>95</sup> Second, they should ensure access to remedies for victims of corporate abuses abroad. The recommendation is very precise in that regard. States should ensure *inter alia* that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction.<sup>96</sup> This applies to parent or subcontracting companies operating abroad.<sup>97</sup> Interestingly, the recommendation further suggests that states allow their domestic courts to exercise jurisdiction against a subsidiary as well,<sup>98</sup> even if it is based in another jurisdiction,<sup>99</sup> when such claims are closely connected with civil claims against business enterprises domiciled within their jurisdiction.<sup>100</sup>

General Comment 23 is in line with these developments in international human rights law. Although it is not as precise as the Recommendation of the Council of Europe, the CESCR also interprets the right to just conditions of work as requiring states to regulate the conduct of corporations operating abroad and ensure access to remedy for victims abroad. Here is the relevant paragraph in General Comment 23:

States parties should take measures, including legislative measures, to clarify that ... enterprises domiciled in their territory and/or jurisdiction are required to respect the right throughout their operations extraterritorially ... States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extraterritorially and that victims have access to a remedy.<sup>101</sup>

The present section shows that corporations have a responsibility to respect the right to just working conditions in their global operations and that states should enforce this responsibility by making sure that corporations are held accountable for violations of that right extraterritorially. In practice, however, how can a corporation be held accountable for a violation of the human right to just conditions of work when it operates through a subsidiary or a supplier abroad? This is a question of domestic implementation of corporate responsibilities to respect human rights and of enforcement in domestic courts, which is the subject of part two that follows.

## **2. Domestic implementation of the corporate responsibility to respect the right to just conditions of work extraterritorially**

For employees working in subsidiaries or suppliers of a multinational enterprise domiciled abroad, there are many hurdles to accessing remedies, even in cases of flagrant violations of their right to just working conditions. Beyond the costs of transnational proceedings and the procedural requirements related to jurisdiction and applicable law,<sup>102</sup> a major legal hurdle is the universal lack of domestic laws establishing the liability of parent or subcontracting companies for the harm suffered by employees from which they benefit abroad. This part aims to show that adopting and enforcing laws establishing the liability of parent and subcontracting companies for human rights violations abroad are necessary to enforce the corporate responsibility to respect the right to just conditions of work extraterritorially.

This section presents the few domestic judgements worldwide that have addressed the liability of parent or subcontracting companies for their failure to respect one or more core elements of the human right to just conditions of work of employees in foreign subsidiaries or suppliers. In the absence of laws clarifying such liability, courts are developing criteria based on existing domestic tort law. Applying tort law that is not equipped to address the parent or subcontracting company's liability proves to be unsatisfactory, as plaintiffs and corporations face much legal uncertainty (2.1). Domestic laws clarifying the conditions of liability of parent and subcontracting companies for human rights violations extraterritorially are necessary. Such law proposals are currently being discussed in Switzerland and France. These proposals go beyond reporting obligations for corporations in the supply chains. They aim to incorporate the concept of corporate human rights due diligence in domestic laws and establish liability rules for the harm caused by parent or subcontracting companies that fail to apply such due diligence (2.2).

## ***2.1 Emergent litigation on the duty of care of corporations to employees abroad***

### ***2.1.1 Parent company liability***

In English tort law, establishing a duty of care traditionally requires a three-stage test.<sup>103</sup> The damage should be foreseeable; there should exist, between the party owing the duty and the party to whom it is owed, a relationship of proximity; and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty.<sup>104</sup> In *Chandler v. Cape*, Mr Chandler worked between 1959 and 1962 in Cape's subsidiary, a factory producing asbestos. In 2007, he contracted asbestosis as a result of exposure to asbestos dust during his period of employment. The appellate court explained how to apply this three-stage test to establish a duty of care for the parent company, Cape, to Mr Chandler, the employee of Cape's subsidiary.<sup>105</sup> Although Chandler was employed in a domestic subsidiary, this test applies without distinction to whether a parent company holds domestic or foreign subsidiaries.<sup>106</sup>

To determine whether Cape had a duty of care to Mr Chandler, the Court highlighted that Cape was 'clearly in the practice of issuing instructions about the products of the company'<sup>107</sup> and that it appointed a doctor to conduct research into the link between asbestos dust and asbestosis.<sup>108</sup> Cape conceded furthermore that the system of work at its subsidiary was defective<sup>109</sup> and knew that the

business had ‘carried on in a way which risked the health and safety of others’.<sup>110</sup> The Court concluded that ‘given Cape’s state of knowledge about the [working site] and its superior knowledge about the nature and management of asbestos risks, [there was] no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise [its subsidiary] on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken.’<sup>111</sup>

Summing up its findings, the Court developed four criteria to help with applying the foreseeability, proximity, and reasonableness test to establish the duty of care of a parent company to the employees of a subsidiary:

(1) [T]he businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.<sup>112</sup>

Two years later in *Thompson v. Renwick*, the appellate court applied those criteria to Renwick, the parent company of a subsidiary for which Mr Thompson worked. Mr Thompson was also exposed to asbestos dust in his work, and as a result, had been seriously incapacitated by diffuse pleural thickening.<sup>113</sup> Reversing the trial court’s decision establishing Renwick’s duty of care, the appellate court found that there was no evidence that Renwick ‘at any time carried on any business at all apart from that of holding shares in other companies.’<sup>114</sup> The first of the four criteria established in *Chandler v. Cape*, according to which the businesses of the parent and subsidiary must be in a relevant respect the same, was thus not satisfied. Furthermore, there was no basis upon which it could be asserted that Renwick ‘either did have or should have had any knowledge of that risk superior to that which the subsidiaries could be expected to have.’<sup>115</sup> The Court insisted that Renwick was a mere holding company and rejected its duty of care with regard to employees of its subsidiary.

In the French case *Venel v. Areva*, the Tribunal des Affaires de Sécurité Sociale de Melun established the circumstances under which a parent company can be, next to the subsidiary, a co-employer and accordingly have a duty to ensure that employees are protected against work-related illnesses.<sup>116</sup> Mr Venel worked for the Cominak uranium-processing factory in Niger. He contracted lung cancer and asked the parent company, Areva, for compensation, claiming Areva held a duty to ensure protective health measures as a co-employer. The tribunal came to the conclusion that

Areva was effectively a co-employer on the grounds that it held shares in Cominak and was the concession holder of the mine exploited by Cominak; that Cominak had a postal address in France at the headquarters of Areva; that both Areva and Cominak conducted identical activities and exploited the same mining site; that Areva, as an expert in the nuclear industry, could not ignore the risks for employees; and finally that Areva had established a local observatory for the health of workers in uranium mines.<sup>117</sup>

The Cour d'Appel de Paris granted Areva's appeal. It found that to be co-employer there must be an intermingling of activities, interest, and management with the contractual employer. This was not the case as Cominak was not technically a controlled subsidiary of Areva, which held only 34% of its shares. Areva did not hold the majority of seats on the board of directors of Cominak, which remained autonomous in its management. The fact that both shared a common postal address and that Areva held the concession to exploit the mine was insufficient. Finally, the fact that Areva agreed to implement local observatories could not provide evidence that Areva recognized its status as employer. The Court concluded that Areva was not a co-employer and thus had no duty to safeguard Mr Venel's health while working at Cominak.<sup>118</sup>

One lesson from these three cases is the uncertainty about criteria that establish a parent company's duty to protect the health of employees in a subsidiary. The first-instance decisions relating to *Thompson* and *Venel* clearly established a duty of care for the parent company. Based on the same evidence, however, the appellate courts clearly rejected such a duty. A second lesson is that the courts did not frame the matter or the health of the workers within the human right to just conditions of working. They also did not contextualize the matter within the current discussions in business and human rights. The courts did not refer to any international standards to assess the conduct of the multinational corporation. This resulted in the creation of criteria in *Chandler* and *Venel* that, although interesting, were unpredictable..

In future cases dealing with the health of workers in subsidiaries, courts should first place the matter within the framework of corporate responsibility to respect the right to just conditions of work extraterritorially. If the facts occurred after the adoption of the UNGP and the OECD Guidelines, they should then orient their criteria to this available international standard for corporate due diligence. Accordingly, courts should first look at whether parent companies have identified and assessed the risk of an adverse impact on the health of employees in their foreign subsidiaries and whether they have assigned responsibilities within the corporation accordingly.<sup>119</sup> It is difficult to ascertain the extent to which the appointment of a doctor by the parent company to research asbestos dust in *Chandler v. Cape* helped the court to establish Cape's duty of care. In any case, appointing a doctor is a way to fulfil the duty to identify risk. It should not be regarded as evidence that such a duty exists, which would otherwise reward parent companies that do not inform themselves about risks in their subsidiaries.<sup>120</sup> By specifying that a parent company does not need to have but only *ought to have* superior knowledge on some relevant aspect of health and safety,<sup>121</sup> the court of appeals in *Chandler* nonetheless made clear that a duty to identify risk may exist



regardless of whether a parent company has taken steps to identify the risk, which is in line with the international due diligence standard.

Furthermore, the UNGP and the OECD Guidelines recommend that parent companies use leverage to mitigate any impact to the greatest extent possible.<sup>122</sup> Leverage means the ability to effect change in the practices of another entity, including a subsidiary.<sup>123</sup> In that respect, in *Chandler v. Cape*, the court stated that it was not necessary to show that the parent company was in the practice of intervening in the health and safety policies of the subsidiary.<sup>124</sup> It may be enough to have evidence that shows that the parent company has a practice of intervening in the trading operations of the subsidiary, which proves a potential ability to intervene,<sup>125</sup> and thus an ability to effect change. To the contrary, the number of shares alone should not be enough to infer leverage. If a presumption of leverage for any parent company owning a majority of shares exists, a practical test must be applied to corporations holding less than a majority to establish their ability to effect change in the conduct of the subsidiary. Strong evidence in *Venel v. Areva* showed that Areva had the ability to effect change in the practice of Cominak,<sup>126</sup> although it had less than the majority of shares. Had the appellate court oriented its finding to the international due diligence standard and the concept of leverage, it perhaps would have confirmed the views of the lower court. The same test of the practical ability to effect change must be applied to subcontracting companies, which is the subject of the next section.

### 2.1.2 *Liability of subcontracting companies*

Due diligence in the UNGP and the OECD Guidelines also applies to subcontracting companies with regard to their suppliers. The matter of *Doe v. Wal-Mart* shows the criteria developed by a U.S. court in 2009, prior to the UNGP, in order to establish the liability of a subcontracting company for the harm suffered by employees of foreign suppliers. In *Doe v. Wal-Mart*, the plaintiffs were employees of companies located in China, Bangladesh, Indonesia, Swaziland, and Nicaragua that sold goods to Wal-Mart. They relied on a code of conduct included in Wal-Mart's supply contracts, specifying basic labour standards that suppliers must meet.<sup>127</sup> The standards from the code of conduct required foreign suppliers to adhere to local laws and local industry standards regarding working conditions such as pay, hours, forced labour or discrimination, and included Wal-Mart's right to conduct on-site inspections of production facilities. The workers alleged that Wal-Mart did not adequately monitor its suppliers and that it knew its suppliers often violated said standards. They further alleged that short deadlines and low prices in Wal-Mart's supply contracts forced suppliers to violate standards in order to satisfy the terms of the contracts.<sup>128</sup>

The Court of Appeals for the Ninth Circuit found that the supply contracts did not intend to protect the workers and that no such duty emerged from the code of conduct. The language and structure of the code of conduct only showed that Wal-Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them.<sup>129</sup> Furthermore, the Court found, as in *Venel*, that Wal-Mart was not the plaintiffs' joint employer. According to the Court, a joint employer must have 'the right to control and direct the activities of the person rendering service, or the manner and method in

which the work is performed.’ The Court added that ‘the right to control employment requires ... a comprehensive and immediate level of “day-to-day” authority over employment decisions.’<sup>130</sup> In practice, no such right of control was exercised by Wal-Mart.

As in the parent liability cases presented in the previous section, the court did not discuss the matter of *Doe v. Wal-Mart* within the framework of the right to just working conditions and more specifically the right to sufficient remuneration, safe and healthy working conditions, or reasonable limitation of working hours. Although the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, domestic courts should orient themselves to the OECD Guidelines and the UNGP to define the scope of due diligence that subcontracting companies should apply in future similar cases. By that standard, subcontracting companies and parent companies should exercise leverage.<sup>131</sup> In supply chains, this leverage depends on circumstances such as the structure and complexity of the chain or the market position of the enterprise vis-à-vis its suppliers.<sup>132</sup> These are the criteria that should guide a judge and not, as in *Doe v. Wal-Mart*, criteria such as whether a code of conduct has been adopted or whether a corporation exercises an immediate level of day-to-day authority.

The ongoing German proceeding *Jabir et al v. KiK* might shed light on the liability of subcontracting companies to ensure safe working conditions under foreign suppliers. In September 2012, over 250 workers died in a fire at a factory in Pakistan that supplied the German textile corporation KiK. In March 2015, four plaintiffs filed a compensation claim against KiK. They alleged that KiK, which was buying 70% of the textiles produced by the factory,<sup>133</sup> shared a responsibility for the fire-safety deficiencies in the Pakistani factory.<sup>134</sup> Indeed, although KiK hired auditing companies to review safety conditions at the factory,<sup>135</sup> the workers could not escape the fire.<sup>136</sup> In the absence of clear liability rules for subcontracting companies under German law, the courts will hopefully clarify the conditions of liability by referring to the international due diligence standard of the UNGP and the OECD Guidelines for Multinational Enterprises.

## ***2.2 Implementing corporate due diligence: from disclosure to liability***

The lack of laws establishing the liability of parent and subcontracting companies for the harm caused to employees abroad is a major barrier for victims in accessing remedies. Domestic courts may possibly orient themselves to the OECD and UN due diligence standard for parent and subcontracting companies to establish liability. Without clear domestic laws, however, workers affected abroad in their right to just conditions of work will continue to face high uncertainty related to the outcomes of such proceedings. This section presents recent legislative developments aimed at closing the accountability gap by incorporating the concept of corporate due diligence into domestic laws. These developments are differentiated according to whether they entail mandatory disclosure alone or whether they also aim to establish liability rules.

### ***2.2.1 Implementing due diligence through mandatory disclosure***

There are at least three legally binding documents that entail disclosure requirements for multinational corporations operating abroad and relate to the material scope of the right to just conditions of work. The first one is the California Transparency in Supply Chains Act of 2010.<sup>137</sup> The material scope of the California Act is much narrower than the right to just conditions of work. It only encompasses slavery and human trafficking and thus only the most severe violations of that right. This Act requires every retail seller and manufacturer doing business in California and having worldwide gross receipts that exceed one hundred million dollars to disclose their efforts to eradicate slavery and human trafficking from their supply chains.<sup>138</sup> The disclosure must be posted on the retail seller's or manufacturer's internet website.<sup>139</sup>

Very similar in scope and purpose, the U.K. Modern Slavery Act 2015<sup>140</sup> is also limited to slavery, servitude, and forced or compulsory labour, as well as human trafficking, which are all traditional criminal offenses. Under part 6, which relates to transparency in supply chains, commercial organizations must prepare a slavery and human trafficking statement.<sup>141</sup> The statement must indicate the steps the organization has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains, nor in any part of its own business.<sup>142</sup> Among other information about due diligence processes, the statement may include information about parts of the organization's business and supply chains where a risk of slavery and human trafficking exists and the steps it has taken to address that risk.<sup>143</sup>

Finally, the European Union Directive 2014/95 on disclosure of non-financial information requires undertakings that exceed 500 employees to present a non-financial statement. The material scope of this directive is much broader than the aforementioned statutes and encompasses human rights in general, including all four core elements of the right to just conditions of work. Among many other elements, the statement should describe due diligence processes implemented<sup>144</sup> related to employee matters,<sup>145</sup> such as gender equality, working conditions, or health and safety at work.<sup>146</sup> The statement should include the principal risks related to those matters connected to the undertaking's operations including, where relevant and proportionate, its business relationships.<sup>147</sup>

The California Transparency in Supply Chains Act, the U.K. Modern Slavery Act, and the European Union Directive 2014/95 do not establish liability rules for parent or subcontracting companies. Rather, mandatory disclosure is a means to bridge human rights due diligence and human rights reporting.<sup>148</sup> Some suggest that mandatory disclosure may influence corporate behaviour, even if information that corporations disclose does not lead to any legal sanctions if they believe that such information could lead to reputational harm.<sup>149</sup> In fact, mandatory disclosure may also increase liability, at least to some extent. During the course of civil litigation, it is certain that these regulations will make it more difficult for corporations that are subject to them to argue that they did not or could not know about employee matters abroad. In that sense, these regulations are an important step towards more liability in global operations, although they do not significantly reduce the uncertainty related to outcomes of transnational litigation. Only clear liability rules may do so.

### 2.2.2 Implementing due diligence through liability rules

There are ongoing legislative developments in France and Switzerland that aim to establish a precise liability rule for parent and subcontracting companies for human rights violations abroad beyond mandatory disclosure. In France, members of the Parliament submitted the *Law proposal relating to the due diligence duty of parent and subcontracting companies*.<sup>150</sup> The law proposal, as adopted by the National Assembly in March 2015, required French corporations to adopt and enforce a due diligence plan in order to identify and prevent human rights violations caused by the corporation's own activities, those of its controlled entities and of suppliers with whom it has an established business relationship.<sup>151</sup> In addition, it established the corporation's liability in case a breach in its due diligence duty causes damage.<sup>152</sup> After several back-and-forth exchanges between the two Chambers, however, the Senate rejected the liability rule and transformed the obligation of adopting and enforcing a due diligence plan into a disclosure requirement.<sup>153</sup> The proposal is now under discussion at the Mixt Commission, in which the two Chambers will have to come to a final agreement or disagreement.

Turning to the Swiss legislative development, a coalition of 77 organizations from Swiss civil society launched the legal federal initiative called *Responsible Business: Protecting Human Rights and the Environment*.<sup>154</sup> The initiative collected the requisite threshold of 100,000 signatures and will therefore be submitted in 2018 to the Swiss electorate. It aims to add Article 101a, named 'responsibility of business', to the Swiss Constitution. The text of the proposed Article 101a of the Swiss Constitution states that companies in Switzerland must respect internationally recognized human rights, thus including the right to just conditions of work, and ensure that these rights are also respected by companies under their control. In that task, companies are required to carry out appropriate due diligence. The text of the initiative further specifies the notion of 'control', which may also result from the exercise of power in a business relationship.<sup>155</sup> The initiative thus encompasses not only subsidiaries controlled through a majority of shares but all subsidiaries and suppliers upon which a Swiss corporation may exercise practical control.<sup>156</sup>

Beyond incorporating into the Constitution the UNGP and OECD concepts of human rights due diligence for Swiss parent and subcontracting companies, the initiative also aims to establish a rule regarding liability in the event that harm occurs and the corporation fails to prove that it carried out appropriate due diligence. The text of the initiative reads as follows:

Companies are ... liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care ... to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.<sup>157</sup>

Technically, if the Swiss electorate accepts the constitutional initiative, the constitutional rule establishing liability for Swiss multinational corporations operating abroad will probably have to

be incorporated into the Swiss Code of Obligations. The table below summarizes the adopted and proposed regulations that aim to implement due diligence that parent and subcontracting companies should apply as regards the human right to just conditions of work.

	<b>Mandatory Disclosure</b>	<b>Rule Regarding Liability</b>	<b>Material Scope</b>	<b>In Force</b>
California Transparency in Supply Chains Act of 2010	Yes	No	Slavery and human trafficking	Yes
European Union Directive 2014/95	Yes	No	Human rights, including employee matters such as gender equality, working conditions, or health and safety at work	Yes
U.K. Modern Slavery Act 2015	Yes	No	Slavery, servitude, and forced or compulsory labour	Yes
French Law Proposal on the Due-Diligence Duty of Parent and Subcontracting Companies	Yes	?	Human rights	No
Swiss Federal Initiative on Responsible Business	Yes	Yes	Internationally recognized human rights	No

## Conclusion

It is a fact that international human rights law is evolving towards more accountability for multinational corporations for human rights violations in their global operations. The second pillar of the United Nations Guiding Principles on Business and Human Rights entails a corporate responsibility to respect human rights. Within that responsibility, corporations should apply human rights due diligence. As also recommended in the OECD Guidelines for Multinational Enterprises, corporations should identify, prevent, mitigate and account for how they address their adverse human rights impacts in their global operations. Furthermore, United Nations human rights treaty bodies increasingly recommend that states ensure that corporations domiciled in their territory are held accountable for human rights violations extraterritorially and that victims abroad have access to remedies.

This article illustrates these developments through and applies them to the right to just conditions of work. At the universal level, the right to just conditions of work entails four core elements: the right to fair, equal, and sufficient remuneration; to safe and healthy working conditions; to equal opportunity for promotion; and to rest, leisure, reasonable limitation of work hours and holidays with pay. Corporations may impact each element in their extraterritorial day-to-day activities. It is thus not a coincidence that Chapter V of the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration, and General Comment 23 of the Committee on Economic, Social and Cultural Rights define specific responsibilities for corporations to respect these core elements.

The existence of specific corporate responsibilities to respect the right to just conditions of work extraterritorially might remain meaningless without domestic laws to implement them. To date, there are no domestic laws establishing the liability of parent or subcontracting companies for the harm caused to employees in foreign subsidiaries and suppliers. As a result, domestic courts must create criteria based on existing tort law, which is not equipped to assess the conduct of multinational enterprises abroad. Despite an emergent case law, the absence of clear rules establishing liability proves unsatisfactory as it leads to much legal uncertainty for victims and corporations.

California, the United Kingdom, and the European Union have adopted measures requiring corporations to disclose information on how they address specific human rights in their activities abroad. Although this is an important step towards liability, it might be insufficient. Disclosure requirements do not clarify the central question regarding the liability of parent and subcontracting companies. While waiting for domestic legislative initiatives to establish the liability of parent and subcontracting companies, such as those currently under discussion in Switzerland or France, domestic courts should at least rely on the already existing UNGP and OECD due diligence standard to establish the conditions of liability of parent and subcontracting companies for violations of the right to just conditions of work in their extraterritorial activities.

It is probably only a matter of time until this international standard transforms into a binding rule. Some countries have already shared their aim to draft a legally binding treaty on business and human rights.<sup>158</sup> Clear binding obligations have been placed on corporations regarding transnational corruption, which were previously mere recommendations. Other than economic reasons, there is no reason why obligations to protect workers in global operations should not be imposed on multinational corporations. Therefore, the questions are instead as follows: how hard will some corporations resist, and how far will states be willing to go to implement these obligations domestically?

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<sup>1</sup> European Center for Constitutional and Human Rights (ECCHR), ‘Pakistan, Cheap Clothes, Perilous Conditions’, case report, August, 2014, at 1.

<sup>2</sup> Human Rights Watch, *Work faster or get out: Labour rights abuses in Cambodia’s garment industry* (18 March 2015), 58.

<sup>3</sup> See Martin-Ortega, Outhwaite and Rook, ‘Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods’ *The International Journal of Human Rights* 19 (2015): 341, 341.

<sup>4</sup> United Nations Guiding Principles on Business and Human Rights, UN. Doc. A/HRC/17/31, 21 March 2011, as endorsed by the Human Rights Council in resolution 17/4 of 16 June 2011.

<sup>5</sup> See in particular, De Schutter et al., ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Human Rights Quarterly* 34 (2012): 1084-1169; Augenstein and Kinley, ‘When Human Rights “Responsibilities” become “Duties”: the Extra-Territorial Obligations of States that Bind Corporations’, in *Human Rights Obligations of Business : Beyond the Corporate Responsibility to Respect?*, ed. Deva and Bilchitz (Cambridge University Press, 2013), 271-294 ; den Heijer and Lawson, ‘Extraterritorial Human Rights and the Concept of “Jurisdiction”’ in *Global Justice, State Duties : The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, ed. Langford et al. (Cambridge University Press, 2013), 153-190; Kaufmann et al., *Extraterritorialität im Bereich Wirtschaft und Menschenrechte*, (Swiss Centre of Expertise in Human Rights, 2016).

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<sup>6</sup> Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or not Law?', in *Human Rights Obligations of Business : Beyond the Corporate Responsibility to Respect?*, ed. Deva and Bilchitz (Cambridge University Press, 2013) : 138-161 ; Martin-Ortega, 'Human Rights Due Diligence for Corporations : from Voluntary Standards to Hard Law at Last?' *Netherlands Quarterly of Human Rights* 32 (2014): 44-74; Bueno and Scheidt, *Die Sorgfaltspflichten von Unternehmen im Hinblick auf die Einhaltung von Menschenrechten bei Auslandsaktivitäten* (Netzwerk Soziale Verantwortung, 2015).

<sup>7</sup> See for instance, Demeyere, 'Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law' *European Review of Private Law* (2015): 385-414.

<sup>8</sup> Skinner, McCorquodale, and De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable, 2013); Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, (Amnesty International, 2014) ; Bueno, *Rechtsgutachten zum Menschenrechtsschutz bei Auslandsaktivitäten österreichischer Unternehmen* (Netzwerk Soziale Verantwortung, 2014).

<sup>9</sup> Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' *Journal of Human Rights* 14 (2015): 248.

<sup>10</sup> On that question, Nolan, 'Corporate Responsibility to Respect Human Rights', 139, 155.

<sup>11</sup> OECD Guidelines for Multinational Enterprises, Edition 2011.

<sup>12</sup> ECOSOC, Commission on Human Rights, Report of the Drafting Committee, UN Doc. E/CN.4/21, 1 July 1947, 21.

<sup>13</sup> *Ibid.*, 63.

<sup>14</sup> ECOSOC, Report of the Third Session, UN Doc. E/800, 28 June 1948, 43.

<sup>15</sup> GA, Third Committee, Draft International Declaration of Human Rights, Byelorussian Soviet Socialist Republic, Amendment to Article 21, UN Doc. A/C.3/366, 25 November 1948.

<sup>16</sup> Arab Charter on Human Rights 2004, entered into force 15 March 2008.

<sup>17</sup> ASEAN, 21<sup>st</sup> ASEAN Summit, Human Rights Declarations, 20 November 2012.

<sup>18</sup> European Social Charter (revised) 1996, CETS 163, entered into force 1 July 1999.

<sup>19</sup> See Bogg, 'Article 31: Fair and Just Working Conditions', in *The EU Charter of Fundamental Rights: A Commentary*, ed. Steve Peers et al., (Nomos, 2014), 833-868.

<sup>20</sup> For regional differences, Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014), 396-400.

<sup>21</sup> ILO, Declaration on Fundamental Principles and Rights at Work, 18 June 1998.

<sup>22</sup> *Ibid.*, par. 3.

<sup>23</sup> See 1.1.2, The material scope of the right to just conditions of work.

<sup>24</sup> See Alston, "'Core Labour Standards" and the Transformation of the International Labour Rights Regime' *European Journal of International Law* 15 (2004).

<sup>25</sup> See Langille 'Core Labour Rights – The True Story (Reply to Alston), *European Journal of International Law* 16 (2005).

<sup>26</sup> Alston, 'Core Labour Standards', 486.

<sup>27</sup> CESCR, General Comment No 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23, 8 March 2016.

<sup>28</sup> *Ibid.*, par. 10.

<sup>29</sup> *Ibid.*, par. 11. For further guidance on equal remuneration for men and women, see also Art. 2 ILO Equal Remuneration Convention 1951 (100).

<sup>30</sup> CESCR General Comment 23, par. 13. For further comments, Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 429.

<sup>31</sup> CESCR, Concluding observations: Mexico, 5 January 1994, UN Doc. E/C.12/1993/16, par. 6 ; Ukraine, 28 December 1995, UN Doc. E/C.12/1995/15, par. 20.

<sup>32</sup> CESCR, El Salvador, 28 May 1996, UN Doc. E/C.12/1/Add.4, par. 18; Hungary, 18 January 2008, UN Doc. E/C.12/HUN/CO/3, par. 14.

<sup>33</sup> CESCR, Benin, 5 June 2002, UN Doc. E/C.12/1/Add.78, par. 34.

<sup>34</sup> CESCR, Kenya, 3 June 1993, UN Doc. E/C.12/1993/6, par. 12.

<sup>35</sup> CESCR, Bolivia, 21 May 2001, UN Doc. E/C.12/1/Add.60, par. 17. For further references, Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 407.

<sup>36</sup> CESCR General Comment 23, par. 18.

<sup>37</sup> Art. 3 ILO Minimum Wage Fixing Convention 1970 (No. 131). For a detailed survey on definition, determination and implementation of a minimum wage: International Labour Conference, *Minimum Wage Systems* (ILO, 2014).

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- <sup>38</sup> Saul, Kinley and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 409.
- <sup>39</sup> CESCR General Comment 23, par. 25.
- <sup>40</sup> *Ibid.*, par. 27. This is also the wording of Art. 5(a) ILO Occupational Safety and Health Convention 1981 (No. 155). See also ILO Promotional Framework for Occupational Safety and Health Convention (No. 187), 2009. For further comments, Saul, Kinley and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 452.
- <sup>41</sup> CESCR General Comment 23, par. 28.
- <sup>42</sup> *Ibid.*, par. 29.
- <sup>43</sup> *Ibid.*, par. 31. Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 470-472.
- <sup>44</sup> CESCR General Comment 23, par. 31.
- <sup>45</sup> On the prohibition of discrimination within the right to work, CESCR, General Comment No 18 on the right to work, (article 6 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/18, 6 February 2006, par. 12; See generally Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 289-320.
- <sup>46</sup> Art. 5 and 8 ILO Termination of Employment Convention 1982 (No. 158).
- <sup>47</sup> In particular to the Hours of Work (Industry) Convention, 1919 (No. 1), Hours of Work (Commerce and Offices) Convention 1930 (No. 30), Weekly Rest (Industry) Convention 1921 (No. 14) and the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106).
- <sup>48</sup> CESCR General Comment 23, par. 35.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> *Ibid.*, par. 37. See also the Forty-Hour Week Convention 1935 (No. 47).
- <sup>51</sup> CESCR General Comment 23, par. 39.
- <sup>52</sup> *Ibid.* See also Holidays with Pay Convention (Revised) 1970 (No. 132).
- <sup>53</sup> ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 4th edn, 2014.
- <sup>54</sup> Martin-Ortega, 'Human Rights Due Diligence for Corporations', 50.
- <sup>55</sup> OECD Guidelines, Chapter II (General Policies), A.10-12, Commentary, at 14.
- <sup>56</sup> Martin-Ortega, 'Human Rights Due Diligence for Corporations', 55.
- <sup>57</sup> Bueno and Scheidt, *Sorgfaltspflichten von Unternehmen*, 4-6.
- <sup>58</sup> Principle 18 UNGP.
- <sup>59</sup> Principle 18(b) UNGP.
- <sup>60</sup> Principle 19(a) UNGP.
- <sup>61</sup> Principle 19(b) UNGP.
- <sup>62</sup> Principle 21 UNGP.
- <sup>63</sup> Principle 22 UNGP.
- <sup>64</sup> Principle 19 UNGP, Commentary; OECD Guidelines, Chapter IV (Human Rights), Commentary, par. 42.
- <sup>65</sup> Principle 19 UNGP, Commentary; OECD Guidelines, Chapter IV (Human Rights), Commentary, par. 43; Martin-Ortega, 'Human Rights Due Diligence for Corporations', 56; De Schutter, 'Corporations and Economic, Social, and Cultural Rights', in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. Riedel, Giacca, and Golay (Oxford University Press, 2014): 193, 215.
- <sup>66</sup> For further OECD documents on the concept of due-diligence, in particular in the supply chain of conflict minerals, Martin-Ortega, 'Human Rights Due Diligence for Corporations', 59.
- <sup>67</sup> OECD Guidelines, Chapter II (General Policies), Commentary, par. 21.
- <sup>68</sup> *Ibid.*, par. 15.
- <sup>69</sup> *Ibid.*, par. 21.
- <sup>70</sup> *Ibid.*, par. 22.
- <sup>71</sup> 1.1.2 The material scope of the right to just conditions of work.
- <sup>72</sup> ILO Tripartite Declaration, par. 33; OECD Guidelines, Chapter V (Employment and Industrial Relations), par. 4(a).
- <sup>73</sup> ILO Tripartite Declaration, par. 34; OECD Guidelines, Chapter V (Employment and Industrial Relations), par. 4(b).
- <sup>74</sup> ILO Tripartite Declaration, par. 38.
- <sup>75</sup> OECD Guidelines, Chapter V (Employment and Industrial Relations), par 4(c).
- <sup>76</sup> ILO Tripartite Declaration, par. 38.
- <sup>77</sup> On employers' responsibilities within article 16 ILO Convention No. 155, see also Saul, Kinley, and Mowbray, *International Covenant on Economic, Social and Cultural Rights*, 461.
- <sup>78</sup> Art. 16 ILO Convention No. 155.
- <sup>79</sup> ILO Tripartite Declaration, par. 22; OECD Guidelines, Chapter V (Employment and Industrial Relations), par. 1(e).
- <sup>80</sup> ILO Tripartite Declaration, par. 34; OECD Guidelines, Chapter V (Employment and Industrial Relations), par. 4(b).



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- <sup>81</sup> CESCR General Comment 23, par. 74.
- <sup>82</sup> *Ibid.*, par. 73.
- <sup>83</sup> *Ibid.*, par. 59.
- <sup>84</sup> Principle 2 UNGP, Commentary.
- <sup>85</sup> Augenstein and Kinley, 'Extra-Territorial Obligations of States that Bind Corporations', 277.
- <sup>86</sup> Principle 2 UNGP, Commentary. For a precise account on the distinction: Kaufmann et al., *Extraterritorialität im Bereich Wirtschaft und Menschenrechte*, 13.
- <sup>87</sup> Augenstein and Kinley, 'Extra-Territorial Obligations of States that Bind Corporations', 291.
- <sup>88</sup> *Ibid.*, 292.
- <sup>89</sup> Bueno, 'Rechtsgutachten zum Menschenrechtsschutz bei Auslandsaktivitäten', 13-14. Among other references CESCR General Comment 14 (2000), The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4 11 August 2000, par. 39; CESCR General Comment 15 (2002), The right to water, UN Doc. E/C.12/2002/11, 26 November 2002, par. 33; Committee on the Elimination of Racial Discrimination, Concluding observations: United States, CERD/C/USA/CO/6, 8 May 2008, at 30; Australia, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, par. 13; Norway, UN Doc. CERD/C/NOR/CO/19-20, 8 April 2011, par. 17; CESCR Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, UN Doc. E/C.12/2011/1, 20 May 2011, par. 5.
- <sup>90</sup> Committee on the Elimination of Racial Discrimination, United Kingdom, UN Doc. CERD/C/GBR/CO/18-20, 14 September 2011, par. 29; Canada, UN Doc. CERD/C/CAN/CO/19-20, 9 March 2012, par. 14; Committee on the Elimination of Discrimination against Woman, General Recommendation 30 (2013), Women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, par. 10-13; CESCR, Austria, UN Doc. E/C.12/AUT/CO/4, 13 December 2013, par. 12; Committee on the Rights of the Child, General Comment 16 (2013), State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16, 17 April 2013, at 43 and 46. For an overview, Kaufmann et al., *Extraterritorialität im Bereich Wirtschaft und Menschenrechte*, 20-33.
- <sup>91</sup> See e.g., CESCR, Concluding observations, Finland, UN Doc. E/C.12/FIN/CO/6, 17 December 2014, par. 10 or Canada, UN Doc. E/C.12/CAN/CO/6, 23 March 2016, par. 15.
- <sup>92</sup> Extraterritorial Obligations Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 28 September 2011.
- <sup>93</sup> De Schutter et al., 'Maastricht Principles on Extraterritorial Obligations', 1139.
- <sup>94</sup> Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business, 2 March 2016.
- <sup>95</sup> *Ibid.*, par. 13.
- <sup>96</sup> *Ibid.*, par. 34.
- <sup>97</sup> Council of Europe, Explanatory Memorandum to Recommendation CM/Rec(2016)3, par. 57-59.
- <sup>98</sup> Council of Europe, Recommendation CM/Rec(2016)3, par. 35.
- <sup>99</sup> *Ibid.*, par. 58.
- <sup>100</sup> *Ibid.*, par. 35.
- <sup>101</sup> CESCR General Comment 23, par. 70.
- <sup>102</sup> On these questions, Skinner, McCorquodale, and De Schutter, *The Third Pillar* and Bueno, *Rechtsgutachten zum Menschenrechtsschutz bei Auslandsaktivitäten*, 11-13 for a focus on European corporations.
- <sup>103</sup> Demeyere, 'Liability Mother Company', 402.
- <sup>104</sup> *Chandler v. Cape Plc* [2012] EWCA Civ 525, par. 32.
- <sup>105</sup> See also Prassl, *The Concept of the Employer* (Oxford University Press, 2015), 208-209.
- <sup>106</sup> The Court referred to *Connelly v. RTZ Corp Plc* [1999] CLC 533 and *Lubbe v. Cape Plc*, 2000 WL 976033, which involve employees of subsidiaries abroad. Both cases were not judged on the merits. See *Chandler v. Cape Plc* [2012] EWCA Civ 525, at 44, 66 as well as comments by Demeyere, 'Liability Mother Company', 404.
- <sup>107</sup> *Chandler v. Cape Plc* [2012] EWCA Civ 525, at 73.
- <sup>108</sup> *Ibid.*, par. 75.
- <sup>109</sup> *Ibid.*, par. 77.
- <sup>110</sup> *Ibid.*
- <sup>111</sup> *Ibid.*, par. 78.
- <sup>112</sup> *Ibid.*, at 80. Also Demeyere, 'Liability Mother Company', at 404.
- <sup>113</sup> *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635, par. 1.
- <sup>114</sup> *Ibid.*, par. 37.
- <sup>115</sup> *Ibid.*, par. 38.

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- <sup>116</sup> Tribunal des Affaires de Sécurité Sociale de Melun, 11 mai 2012, n° 10/00924, 6.
- <sup>117</sup> *Ibid.*, 6 and 7. See also Ronin, ‘Faute inexcusable dans les groupes de sociétés : la responsabilité de la société mère retenue en cas de co-emploi’, *Revue Lamy Droit des affaires* 76 (2012) : 88, 89.
- <sup>118</sup> Cour d’Appel de Paris, 24 oct. 2013, no 12/05650.
- <sup>119</sup> See 1.2 The corporate responsibility to respect the right to just conditions of work extraterritorially.
- <sup>120</sup> Also De Schutter, ‘Corporations and Economic, Social, and Cultural Rights’, 213.
- <sup>121</sup> *Chandler v. Cape Plc* [2012] EWCA Civ 525, par. 80.
- <sup>122</sup> OECD Guidelines, Chapter IV (Human Rights), Commentary, at 42.
- <sup>123</sup> See 1.2.1 General corporate human rights due diligence.
- <sup>124</sup> *Chandler v. Cape Plc* [2012] EWCA Civ 525, par. 80.
- <sup>125</sup> See also Demeyere, ‘Liability Mother Company’, 404.
- <sup>126</sup> Tribunal des Affaires de Sécurité Sociale de Melun, 11 mai 2012, n° 10/00924, 6.
- <sup>127</sup> *Doe v. Wal-Mart Stores Inc.*, 572 F.3d 677, 680 (9th Cir. 2009), 680.
- <sup>128</sup> *Ibid.*
- <sup>129</sup> *Ibid.*, 682.
- <sup>130</sup> *Ibid.*
- <sup>131</sup> OECD Guidelines, Chapter IV (Human Rights), Commentary, at 43 and Principle 19 UNGP, Commentary. See section 1.2.1 General corporate human rights due diligence.
- <sup>132</sup> OECD Guidelines, Chapter II (General Policies), Commentary, par. 21.
- <sup>133</sup> ECCHR, ‘Pakistan: Cheap Clothes, Perilous Conditions’, Case Report, April 2016, at 1.
- <sup>134</sup> ECCHR, ‘Paying the price for catastrophes: Survivors of Pakistani factory fire sue German clothing retailer KiK’, Case Report, March 2015, at 1.
- <sup>135</sup> ECCHR, *supra* note 100, at 1.
- <sup>136</sup> *Ibid.*
- <sup>137</sup> For a contribution on the California Transparency in Supply Chains discussed in this Journal, Greer and Purvis, ‘Corporate Supply Chain Transparency : California’s Seminal Attempt to Discourage Forced Labour’ *The International Journal of Human Rights* 20 (2016) : 55-77.
- <sup>138</sup> California Transparency in Supply Chains Act, Section 3, adding Section 1714.43(a) to the California Civil Code.
- <sup>139</sup> *Ibid.*, adding Section 1714.43(b) to the California Civil Code.
- <sup>140</sup> Modern Slavery Act, 2015, Chapter 30.
- <sup>141</sup> Provision 54(1) Modern Slavery Act 2015.
- <sup>142</sup> Provision 54(4)(a) Modern Slavery Act 2015.
- <sup>143</sup> Provision 54(5) Modern Slavery Act 2015.
- <sup>144</sup> European Union, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014.
- <sup>145</sup> *Ibid.*, Art 1, inserting Article 19(1)(b) to Directive 2013/34/EU.
- <sup>146</sup> *Ibid.*, Recital 7.
- <sup>147</sup> *Ibid.*, Art 1, inserting Article 19(1)(d) to Directive 2013/34/EU.
- <sup>148</sup> Park, ‘Human Rights Reporting as Self-Interest: the Integrative and Expressive Dimensions of Corporate Disclosure’, in *Law, Business and Human Rights : Bridging the Gap*, ed. Bird, Cahoy, and Prenkert (Edward Elgar, 2014), 48.
- <sup>149</sup> *Ibid.*, 49.
- <sup>150</sup> Assemblée Nationale, Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, as adopted in first reading on 30 March 2015.
- <sup>151</sup> Proposed Art. 225-102-4 French Commercial Code.
- <sup>152</sup> Proposed Art. 225-102-5 French Commercial Code.
- <sup>153</sup> Sénat, Proposition de loi modifiée par le Sénat en deuxième lecture relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, 13 October 2016.
- <sup>154</sup> The English translation of the initiative’s text is available at <http://konzern-initiative.ch/?lang=en> (last visited 02 May 2016).
- <sup>155</sup> Proposed Art. 101a(a) Swiss Constitution.
- <sup>156</sup> This has been discussed by Kaufmann, ‘Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?’ in *Swiss Review of Business and Financial Market Law* (2016): 50-51. See also Bueno and Scheidt, *Sorgfaltspflichten von Unternehmen*, 24.
- <sup>157</sup> Proposed Art. 101a(c) Swiss Constitution.
- <sup>158</sup> Ramasastry, ‘Bridging the Gap Between Responsibility and Accountability’ *Journal of Human Rights* 14 (2015): 248-249.